Supreme Court, U.S.
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No. 96-1223

In The Supreme Court of the United States

October Term 1996

JOY TECHNOLOGIES, INC., COAL FIELD OPERATIONS,

Petitioner,

v.

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY BRIEF

Respondent, Secretary of Labor, agrees that the courts of appeal are divided on the question of who is a statutory "operator" and thus subject to the jurisdiction of the Federal Mine Safety and Health Act (the "Mine Act"). Brief in Opposition, p. 9. As Petitioner, Joy Technologies, Inc. ("Joy"), suggested, employers in the Third and Fourth Circuits may not be covered by the Mine Act but would be covered if in the Tenth Circuit or if the losing party before the Federal Mine Safety and Health Review Commission ("FMSHRC") seeks review in the D.C. Circuit.

The Secretary also agrees, albeit tacitly, that the decision of the court below conflicts with the decisions of this Court. The arguments made by Respondent Secretary of Labor reject the common law meaning of the term "independent contractor" and seek a much broader definition of the term "independent contractor." No reason is set forth to justify the rejection of the normal common law meaning of the term.

ARGUMENT

I.

Respondent, Secretary of Labor, cannot and does not take issue with Joy's assertion that the courts of appeal are split on the meaning of the term "operator" in the Mine Act. The Secretary's attempts at minimizing the importance of the issue, however, result in badly mistaken statements in the Secretary's Brief in Opposition.

Contrary to the Secretary's arguments, the Fourth Circuit's decision in *Old Dominion Power Co. v. Donovan*, 772 F.2d. 92 (4th Cir. 1985), concerning the term "operator" was reaffirmed in that court's decision in *United Energy Servs., Inc., v. FMSHA*, 35 F.3d 971, 976 (4th Cir. 1994). Also contrary to the Secretary's arguments, Joy herein would not be a covered "operator" under decisions of the Fourth Circuit because Joy controls no area of a mine. *Old Dominion*, 772 F.2d at 97. Thus, there is, to use the Secretary's words, a "disagreement" between the Fourth, Tenth and D.C. Circuits. Similarly, the gravamen of the decision by the Third Circuit in *Nat'l Indus. Sand Assn. v. Marshall*, 601 F.2d 689 (3d Cir. 1979), is that the term "operator" does not include all independent contractors. Thus, the Third Circuit also disagrees with the Tenth and D.C. Circuits.

This clear conflict means that the determination of who is an "operator" for purposes of the Mine Act is not determined by the Mine Act itself, but is dependent upon which court of appeals interprets the Mine Act. Furthermore, the Secretary fails to address the important problem of forum shopping under the Mine Act which allows a losing party under an FMSHRC decision to seek review before either the circuit court sitting in the place where the violation allegedly occurred or before the D.C. Circuit. Compliance with federal safety regulations should not turn upon the choice of forums.

To justify the decision below, the Secretary claims the expanded definition of the Mine Act's coverage is necessary because of Joy's endangerment of the lives of

miners. Brief in Opposition at p. 12. The Secretary either ignores or distorts the obvious fact that, if the Mine Act does not apply, OSHA does. See Brief in Opposition at p. 12, n.6. Workers whose employers are not covered by the Mine Act are protected by the provisions of OSHA. See authority cited in Petition at pp. 16-17; see also *Secretary of Labor v. Texas Eastern Transmission Corp.*, 3 BNA OSHC 1601, 1605 (OSHRC, 1975) (contractor performing services on property subject to Department of Transportation pipeline safety regulations is subject to the OSH Act); *Secretary of Labor v. Gold Kist, Inc.*, 7 BNA OSHC 1390 (Digest) (OSHRC ALJ. 1979) (company performing work on property covered by safety regulations of the Federal Railway Administration must comply with OSH Act regulations).[1]

As the amicus curiae rightly points out, it is confusing to workers and contrary to the remedial

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[1] In each case, the federal Occupational Safety and Health Review Commission and its ALJ construed the authority of the exempting agency, e.g., the Office of Pipeline Safety, to determine whether safety regulations promulgated by that agency applied to a contractor. The OSH Act was used to fill the gap when regulations of the exempting agency did not apply to the employer. The Commission and the courts have been quick to use the protective mantle of the OSH Act to protect workers whenever the statutory authority or the safety regulations of an exempting agency, e.g., the Coast Guard, are not broad enough to include some employers and employees. See, e.g., *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d. Cir. 1984).

purposes of both the Mine Act and the OSH Act, to require employers and employees to follow different safety rules, particularly when the rules are different for the same hazard. Employers and employees coming on mine property should not be subject to differing interpretations concerning their statutory obligations. Thus, the Petition for Certiorari should be granted.

II.

The Respondent makes no pretense of addressing the issue raised in the Petition concerning the conflict of the decision below with this Court's decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). Instead, the Secretary begs the question by arguing that there is no conflict with this Court's decisions because "none of this Court's cases have construed the phrase at issue in this case." See Brief in Opposition at p. 7. Beyond the sophistry of distinguishing *Darden* because it did not decide the precise issue here, the Secretary never explains why *Darden's* admonition to define terms by their common law meaning should be ignored. Respondent's arguments on this issue proceed from the incorrect assumption that the term "independent contractor" should be given a broader meaning than it was given at common law.

In effect, the Secretary's expansive reading of its own jurisdiction would eliminate the common law element of "control" from the definition. The Secretary's argument clearly conflicts with the definition of the term "independent contractor" used by the Fourth Circuit in its *Old Dominion* decision and with *Darden's* admonition to

use a term's commonly understood meaning. Further, even if the Secretary is correct, this Court should still grant review to resolve the conflict and to provide uniform guidance on the applicability of major safety legislation such as the Mine Act.

The conflicting decisions of the courts of appeal and the misapplication of the decisions of this Court create confusion for the regulated communities. Mine operators and miners under the Mine Act and, more broadly, employers and employees under the OSH Act should have clear guidance on what set of safety regulations apply. Intervention by this Court is necessary to end the confusion.

CONCLUSION

For the foregoing reasons and for the reasons previously presented, the Petition for Certiorari should be granted.

Respectfully Submitted,

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